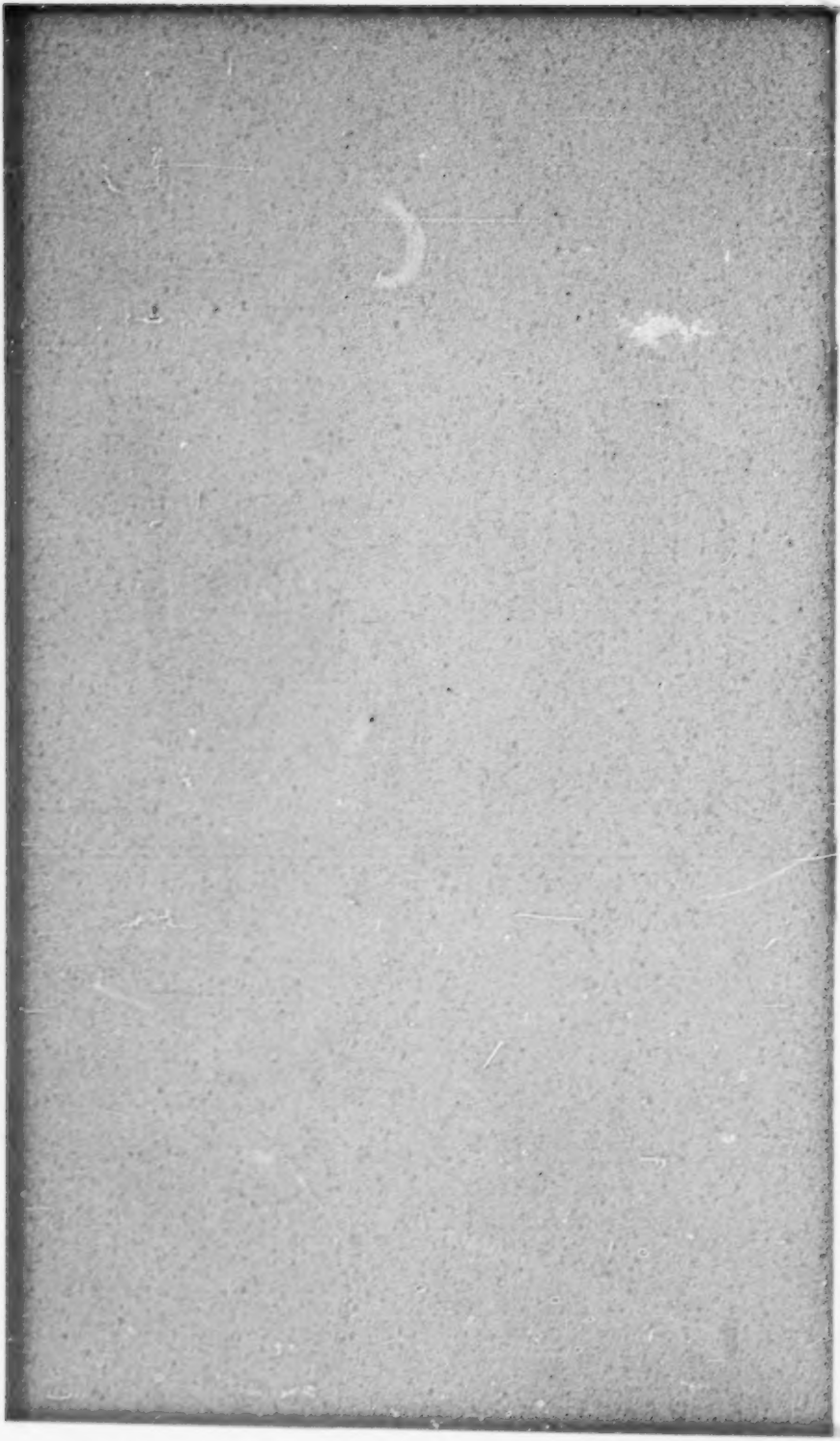

(41472) SUPREME COURT, U. S.

APR 11 19

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

CITY OF NEW YORK, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, AND THE CITY OF DETROIT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THE CITY OF NEW YORK

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Supplementary Statement

This case is a continuation of a controversy between the Congress and the Executive branch over the appropriate size of a program to clean up the nation's waterways and the manner in which such a program should be funded. In 1971 the Administration proposed a $6 billion program with the customary authorization-appropriation funding procedure. Extensive hearings on the subject were held by

committees in both houses of Congress. Ultimately separate bills were passed in the House and Senate which each authorized a level of funding substantially greater than that proposed by the Administration.

After many months of discussion the Conference Committee reported the Act in its present form. It authorizes a total of $18 billion for the fiscal years 1973 through 1975 to fund a sewage treatment plant construction grant program. The authorized sums are made available to the States by an allotment procedure; grants are to be made from the allotments through the exercise of special contract authority by the Administrator, rather than by the customary authorization-appropriation method.

Congress passed the Act on October 4, 1972. The President vetoed it on October 17, 1972 on the ground that it provided for "the commitment" of a "budget-wrecking" sum. The Senate overrode the veto the same day and the House followed suit the next day. On November 22, 1972 the President directed the Administrator to allot among the States only $5 billion of the $11 billion that the Act authorized for fiscal years 1973 and 1974. The Administrator complied with the President's direction on December 8.*

The respondent City then brought suit. It has been the City's position that the dispute between Congress and the Executive branch as to the level of funding had been, in effect, resolved by the override of the veto and that the Act requires the Administrator to allot the full sums authorized. The Government has countered by adhering to

* On January 15, 1974 the Administrator allotted $4 billion of the $7 billion authorized for fiscal year 1975 (Petition, p. 5). The Solicitor General includes the $3 billion difference in his conclusion that $9 billion is involved in the case (Petition, p. 6).

the argument that certain changes in the Act made by the Conference Committee indicated a congressional intent that the Administrator could allot less than the sums authorized. Both the Court of Appeals and the District Court rejected the Administrator's argument. Those courts found, instead, that the changes made by the conferees, as explained during the debates in both houses, were merely intended to make clear that the Administrator had some power to control the rate of spending under the Act at the point when funds were actually obligated, namely, when the Administrator exercised his authority to enter into grant contracts. Neither court found any congressional intent to permit the Administrator to reduce the total amount available for obligation by allotting less than the full sums authorized.

It is apparent that a clear view of the funding procedure established in the Act is essential to consideration of whether certiorari should be granted. The legislative history shows that this funding procedure was chosen with deliberation to serve two purposes: to make sure the full amounts authorized would be available for ultimate spending and to inform the States (and through them, their local governments), at an early stage, of the scope of the waste treatment programs they could prudently plan.

The adopted procedure involves six separate steps:* (1) congressional authorization to appropriate funds, which sets a total ceiling on the amounts available for eventual obligation and spending; (2) allotment by the Administrator of the authorized totals among the States, pursuant to

* Step (1) is provided for in §207; Step (2) in §205; Steps (3) and (4) in §§203 and 204; Steps (5) and (6) follow as a matter of regular governmental procedure.

a statutory formula, which establishes State-by-State ceilings; (3) submission by local governments, through their States, of specifications and cost estimates for each proposed waste treatment project; (4) review by the Administrator of each submission and, upon his approval, a federal commitment (obligation) to pay the 75% federal share of the particular project; (5) appropriation of funds to liquidate obligations as they fall due; and (6) actual disbursement of funds.

The Petition omits the third step and does not mention the lengthy process of State and municipal planning which must necessarily precede it. The location, capacity, technology, preliminary and final design and estimated costs of waste treatment plants must be determined by local governments and coordinated on a State-wide basis before applications for federal grants can be submitted for the Administrator's approval. In addition, plans must be made and authority established for financing the non-federal 25% of construction cost and the projected costs of operation and maintenance. As the District Court pointed out, "[t]he seriousness of the planning problem was understood by Congress" and Congressman William Harsha, one of the managers of the bill, expressly addressed himself to it in opposing a proposed amendment which would have substituted the normal appropriations process for contract authority funding (59A, 65A-66A).*

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* References are to the combined Appendix the Solicitor General chose to submit, presumably with the Court's approval, in this and another case arising out of the same statute but involving different legal issues.

Reasons the Petition Should Be Denied

The Solicitor General's four reasons for granting the writ all proceed from a false premise: that allotment of the full amounts authorized precludes any Executive control over actual spending. As the Supplementary Statement above and the opinion of the Court of Appeals make clear, that is just not so. Spending occurs long after allotments are made and is subject to review and approval of detailed submissions for individual projects. Whatever Executive control over the rate of actual spending was intended, it can be exercised at a later stage and does not require frustration of the congressional scheme at its outset.

All four of the reasons appear to be advanced in support of the Rule 19 guideline explicitly stated in only the first reason: that the decision below "presents an important question that this Court should review" (Petition, p. 6). Undeniably the case is important. However, once the misconceived premise is recognized, it is clear that the importance is limited to the water pollution control program. And the legal question presented is simply one of statutory construction (see the Court of Appeals' "Conclusion" at 34A, including fn. 39). Moreover, the question is not one which will recur and on which the lower federal courts will require guidance in the administration of the Act. And no other Act is likely to have exactly the same wording or can have the same legislative history. Furthermore, a reading of the opinion below leaves no doubt but that the Court of Appeals approached the statutory question in the approved way, placed the critical statutory provi-

sions in the context of the entire Act, carefully analyzed the relevant legislative materials and reached a sound conclusion.

In short, there is no "special and important" reason for the Court to review the Court of Appeals' decision. But, even if the Court decides to grant certiorari, this case could well be disposed of summarily because of the obvious correctness of the decision below. *See, e.g., United States* v. *Lane Motor Co.*, 344 U.S. 630.

(1)

In support of his first reason for granting the writ the Solicitor General makes three statements: (i) the decision below will require the Administrator immediately to allot $9 billion among the States; (ii) the case has "important ramifications" for the power of the Executive to control the Government's spending in that it encroaches upon a discretion Congress intended the President to have; and (iii) the same issue is pending in cases before three other Circuits.

The first of these statements indicates only that the decision requires bookkeeping which, under the statutory scheme, will make a sum of money available for possible ultimate spending. The Solicitor General is careful not to deny a congressional intent that the full amount be ultimately spent. Thus even in the Government's view this case only involves the mechanics affecting the rate at which that sum will be spent.

With regard to the second statement, it completely fails to articulate the "ramifications" this case has for the power of the Executive to control the rate of

spending.* Since the Government expressly conceded below** that Congress could constitutionally direct the Executive to allot and that allotment does not commit the Government to obligation, it is clear that there are no such "ramifications." The Petitioner's reference (p. 6) to the congressional intent is but a bare assertion that the court below was wrong.

As to the cases in other Circuits, the Administrator is a defendant in all of them and to the best of our knowledge took no action to stay all but a pilot case pending final determination of the issue. Under these circumstances it would not seem appropriate for the Court to give any weight to such avoidable multidistrict litigation. In the event certiorari should be denied, it would appear that the other cases would not continue.†

(2)

The Solicitor General's second reason is that if the decision below stands, "[a] court might" at some future time hold that the Administrator lacked power to control the rate of spending at the later obligation stage—the stage at which the court below recognized the Administrator would

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* After initial ambivalence the Government abandoned the argument that, in the event the Act was interpreted to require allotment, a constitutional question was raised as to the power of Congress to direct such action by the Executive branch. *See* the City's *amicus curiae* brief in *Georgia* v. *Nixon, et al.*, No. 63, Original, *motion for leave to file bill of complaint denied* 414 U.S. 810; and p. 34A n. 39.

** *See* 34A n. 39.

† The order in this case requires allotment of the full sums authorized for fiscal years 1973 and 1974. Hence, if certiorari is denied and the Court of Appeals order goes into effect, there would seem to be no reason for other courts to continue litigation seeking the same relief.

have some discretion to control spending. In that event, the Petition states, the Administrator would end up with no control over spending. The power of this Court to review any such decision a court "might" render would seem to be ample protection for the Government.

(3)

As a third reason for granting the writ, the Solicitor General recites the legislative changes made in Conference and says the Court of Appeals made no effort to explain them. On the contrary, that court dealt at length with those very changes. With painstaking care it analyzed them in the context in which they were made (11A, 19A-25A).

(4)

The Solicitor General's final point is difficult to follow. He seems to assert that if, at some future date, the Administrator's power to control the rate of spending is limited by court decision (*i.e.* a decision "a court might" render, as referred to in (2) above), it would at that time be apparent that the instant suit should have been barred by the doctrine of sovereign immunity. He argues also that this case is subject to the defense of sovereign immunity since the ultimate effect of allotment is expenditure.

We do not understand the petition to urge a grant of certiorari to review the rejection below of the sovereign immunity argument except upon the hypothesis as to what "[a] court might" some day decide about the power to control the rate of spending at the obligation stage. In any event, the District Court's opinion on sovereign immunity (63A-64A), which the Court of Appeals adopted (10A-11A), clearly followed the governing decisions by this Court.

CONCLUSION

The petition for certiorari should be denied, or, if certiorari is granted, the decision below should be summarily affirmed.

April, 1974

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